

State of Missouri  
Office of Ombudsman for Property Rights

2023 Annual Report



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## **I. Introduction**

The United States Constitution’s Takings Clause states, “nor shall private property be taken for public use, without just compensation.”<sup>1</sup> The Missouri Constitution expands this protection to damaged property, stating “[t]hat private property shall not be taken or damaged for public use without just compensation.”<sup>2</sup> Condemnation of private property using the power of eminent domain must be for a public use and it requires just compensation to the property owner.

Following the Supreme Court of the United States’ decision in *Kelo v. City of New London*<sup>3</sup> the Missouri General Assembly passed House Bill 1944 (2006), which provided additional protections for landowners and created the Ombudsman for Property Rights (the “Ombudsman”).

The Ombudsman assists Missouri citizens “by providing guidance, which shall not constitute legal advice, to individuals seeking information regarding the condemnation process and procedures.”<sup>4</sup> The Ombudsman also documents the use of eminent domain in Missouri along with any issues associated with its use and submits that information in an annual report to the General Assembly.<sup>5</sup>

## **II. Eminent Domain in Missouri During 2023**

It is clear that throughout 2023 many entities sought to condemn property across Missouri using the power of eminent domain. This report will first address the potential change that occurred to the laws governing condemnation proceedings, found in Chapter 523 of the Revised Statutes of Missouri. It will then address three projects that are likely to utilize eminent domain authority. Next, it will briefly address the calls received by the Ombudsman. Finally, it will suggest legislative changes to address several concerning trends that arose during calls from landowners throughout the year.

### **A. 2023 Changes to Chapter 523 of the Revised Statutes of Missouri**

Though the legislature did not change the laws governing condemnation proceedings during 2023, a recent decision by the Supreme Court of the State of Missouri will likely change one provision.

In *Byrd v. State*, 2023 Mo. LEXIS 403 (Mo. Dec. 19, 2023),<sup>6</sup> the Missouri Supreme Court struck down Truly Agreed and Finally Passed House Bill 1606 (“HB 1606”), which contained an

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<sup>1</sup> U.S. Const. amend. V.

<sup>2</sup> Mo. Const. art. 1, § 26.

<sup>3</sup> 545 U.S. 469 (2005).

<sup>4</sup> § 523.277 RSMo.

<sup>5</sup> *Id.*

<sup>6</sup> The Missouri Supreme Court issued its decision on December 19, 2023. At the time of this Report, the time for any party to request that the Court rehear or reconsider its decision in *Byrd* has not yet expired. *See* Mo. R. Civ. P. 84.17(b). The Court’s *Byrd* decision will not be final until this period expires and/or the Court rules on any filed motion.

amendment to § 523.061 RSMo.<sup>7</sup> Therefore, the newly added language of § 523.061 RSMo. will become unenforceable.

Section 523.061 of the Revised Statutes of Missouri pertains to the determination of homestead taking and heritage value.<sup>8</sup> Particularly this statute specifies when the presiding circuit judge will increase a condemnation award to account for a homestead taking or heritage value.<sup>9</sup>

In HB 1606, the Missouri legislature added language to § 523.061 RSMo., which made two changes.<sup>10</sup> First, the legislature included language making clear that the presiding judge must decide whether a homestead taking has occurred and whether heritage value applies in all condemnation cases, including those cases in which a jury trial on exceptions occurs.<sup>11</sup> Second and importantly, the legislature added language that allows a circuit judge to not increase a condemnation award to account for heritage value in certain circumstances, even if it would have otherwise applied.<sup>12</sup>

In its *Byrd* decision, the Missouri Supreme Court struck down HB 1606 in its entirety—including the amendments to § 523.061 RSMo.—for violating the single subject requirement of article III, section 23 of the Missouri Constitution.<sup>13</sup> Therefore, these amendments to § 523.061 RSMo. are void.

#### **B. Select Projects that May Utilize Eminent Domain Authority**

Three projects that will likely utilize eminent domain authority warrant discussion in this Report. The first two projects—the Shuyler Creek Trail expansion and Every Missouri West, Inc.’s desire

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<sup>7</sup> *Byrd v. State*, 2023 Mo. LEXIS 403, at \*11 n.8 (Mo. Dec. 19, 2023).

<sup>8</sup> *See* § 523.061 RSMo.

<sup>9</sup> *See id.*

<sup>10</sup> H.B. 1606, 101st Gen. Assemb., 2nd Reg. Sess. (Mo. 2022).

<sup>11</sup> *See id.*

<sup>12</sup> Specifically, the included language states:

Notwithstanding any other provision of law in sections 523.001 to 523.286 to the contrary, a circuit judge who determines that heritage value is payable as provided in this section shall not increase the commissioners' award or jury verdict to provide for the additional compensation due where heritage value applies if the plaintiff is a city, town, or village that is incorporated in accordance with the laws of this state and the plaintiff moves for exclusion of the heritage value and shows after an evidentiary hearing by a preponderance of the evidence that the property taken has been:

- (1) Abandoned;
- (2) Declared a nuisance and been ordered to be vacated;
- (3) Demolished or repaired after notice and hearing; or
- (4) Materially and negatively contributed to a blighted area as that term is defined in section 99.805.

*Id.*

<sup>13</sup> *See Byrd*, 2023 Mo. LEXIS 403, at \*11.

to expand its easement along Highway 13 in Lafayette and Johnson Counties—came to light during phone calls received from Missouri landowners. Landowners potentially affected by these projects contacted the Ombudsman with concerns relating to the exercise of eminent domain authority they faced. The third project is the Grain Belt Express transmission line, perhaps the most well-known project that will likely utilize eminent domain authority in this State. The Public Service Commission of the State of Missouri recently granted a new Certificate of Convenience and Necessity to Grain Belt Express, LLC that allowed a material change to the original project. This Report will address each of these projects in turn below.

## **1. Shuyler Creek Trail Expansion**

The Ombudsman received calls from several individuals potentially affected by the expansion of the Shuyler Creek Trail near Republic, Missouri.

The City of Republic (“Republic”) maintains a website describing the Shuyler Creek Trail Expansion at <https://www.republicmo.com/713/Shuyler-Creek-Trail-Expansion>. On this website, Republic represents that this will be a 10-foot wide asphalt trail along the south side of Farm Road 182 to Wilson’s Creek National Battlefield.<sup>14</sup> Republic estimates the total construction cost of this project to be \$1.7 million to \$2.2 million.<sup>15</sup> It also represents that the project is funded by a Missouri Department of Transportation (“MODOT”) Surface Transportation Block Grant and by a partial match from the Republic Capital Investment Sales Tax Fund.<sup>16</sup> This website states that construction was to be completed in Winter/Spring 2023.<sup>17</sup>

It is the Ombudsman’s understanding that although Republic maintains the website related to this project it will extend into unincorporated Greene County as well. Many of the landowners who contacted the Ombudsman reside outside of Republic city limits. In their calls to the Ombudsman, many of these landowners raised concerns regarding various aspects of the use of eminent domain to take their property. For instance, many raised concerns about the information they received regarding which entity sought to take their property—either Republic or Greene County. Additionally, some mentioned that Republic had previously represented that it would not use eminent domain to take property for the project, but now represented to landowners that it would condemn their property if the landowners could not reach an agreement with Republic for the appropriate amount of just compensation. Another landowner mentioned that he had not received notice of the project, but the project would require Republic to acquire part of his land. Landowners also noted the difficulty they experienced as they attempted to gather additional information.

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<sup>14</sup> See City of Republic, MO, *Shuyler Creek Trail Expansion*, <https://www.republicmo.com/713/Shuyler-Creek-Trail-Expansion> (last accessed December 29, 2023).

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* The Ombudsman received several calls regarding this project in Fall 2023 from landowners who stated that they were in discussions regarding the acquisition of their property for this project.

At least one news source reported on the use of eminent domain to complete the project, noting that the project “left some homeowners feeling unheard and concerned about the impact on their properties.”<sup>18</sup>

## **2. Evergy Highway 13 Electric Line Project and Associated Cases**

The Ombudsman also received several calls regarding Evergy Missouri West, Inc.’s (“Evergy”) use of eminent domain to expand its easement along a portion of Highway 13 in Johnson and Lafayette Counties. Several cases now address this project, including cases before the Public Service Commission of the State of Missouri (the “Commission”), the Circuit Court of Johnson County, and the Circuit Court of Lafayette County.

Many of the landowners<sup>19</sup> effected by this project filed complaints before the Commission alleging that Evergy exceeded its Certificate of Convenience and Necessity and made material misrepresentations regarding the project and its easements as it began communicating with landowners.<sup>20</sup> The complainants also questioned the reason for Evergy’s desire to expand its easement.<sup>21</sup> Specifically, the complainants pointed out that Evergy initially told landowners that it was required to expand its easement due to MODOT’s planned widening of the road.<sup>22</sup> However, complainants later learned that this was false, as MODOT’s planned project did not affect Evergy’s easements for a majority of Evergy’s planned project and MODOT had no plans to complete a project that would affect Evergy’s easements.<sup>23</sup>

On November 6, 2023, the Staff of the Commission (“Staff”) filed its Recommendation, in which it “contends that Evergy has exceeded the bounds of its CCN based on the authority granted in ordered paragraph one of the CCN order extending to construction in the right of way.”<sup>24</sup> The Recommendation recognizes that although Evergy initially cited MODOT’s widening of the road as the reason for the expanded easements, it now relied on a change in policy.<sup>25</sup> The Recommendation recognizes that “Staff’s investigation has revealed quite a bit of contradictory and confusing data, which would hopefully be straightened out at a hearing.”<sup>26</sup>

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<sup>18</sup> Sha’Diya Tomlin, *Republic Landowners Face Possible Condemnation to Make Way for Shuyler Creek Trail Expansion*, Ozarksfirst.com (Aug. 15, 2023 10:19 pm), <https://www.ozarksfirst.com/top-stories/republic-landowners-face-possible-condemnation-to-make-way-for-shuyler-creek-trail-expansion/>.

<sup>19</sup> The Commission consolidated thirty-seven cases with the original case and ordered that the entire case proceed under Case Number EC-2024-0015. *See* Order Consolidating Files & Dismissing Party 3, Case Number EC-2024-0015, Docket Item 28.

<sup>20</sup> *See, e.g.*, Formal Complaint, Attachment 2-4, Commission Case Number EC-2024-0015, Docket Item 3.

<sup>21</sup> *Id.* 3.

<sup>22</sup> *Id.* 2-3.

<sup>23</sup> *Id.*

<sup>24</sup> Staff Recommendation 9, Commission Case Number EC-2024-0015, Docket Item 57.

<sup>25</sup> *Id.* 3.

The Commission scheduled an evidentiary hearing for January 23-25, 2024 to consider the complaints.<sup>27</sup>

In the midst of the proceedings before the Commission, Evergy filed a condemnation action in both Lafayette and Johnson County Circuit Courts<sup>28</sup> to acquire some<sup>29</sup> of the land necessary to expand its easements. In fact, Evergy originally filed its condemnation petitions in both counties two days after the original complainant filed his complaint before the Commission. Evergy voluntarily dismissed its initial condemnation action in Lafayette County Circuit Court, but refiled it one week later. All three cases—including the case Evergy attempted to dismiss—have motions hearings scheduled for early 2024.

### **3. Grain Belt Express Transmission Line**

Perhaps one of the most notable projects using eminent domain authority in Missouri is the electric transmission line known as the “Grain Belt Express.” The Commission issued Grain Belt Clean Line LLC (“GBCL”) a Certificate of Convenience and Necessity (“CCN”) to construct the Grain Belt Express transmission line in 2019.

In the latter half of 2022, Grain Belt Express LLC (“GBE LLC”)<sup>30</sup> filed an Application to Amend that CCN.<sup>31</sup> On October 12, 2023, the Commission issued its Report and Order granting GBE LLC’s requested CCN, with specified conditions.<sup>32</sup> This decision is not yet final because at the time of this Report the time for filing a Notice of Appeal has not yet expired.<sup>33</sup>

Below is a short description of the original Grain Belt Express project, a description of GBE LLC’s requested amendment, and a description of the Commission’s most recent decision.

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<sup>26</sup> *Id.*

<sup>27</sup> Order Establishing Procedural Schedule 2, Commission Case Number EC-2024-0015, Docket Item 80.

<sup>28</sup> See *Evergy Missouri West, Inc. v. Donald W. Rasa*, Case Number 23LF-CV00700 (Lafayette Cnty. Cir. Ct.) (filed July 27, 2023); *Evergy Missouri West, Inc. v. Dwayne E. Marsh*, Case Number 23JO-CC00142 (Johnson Cnty. Cir. Ct.) (filed July 27, 2023). On September 22, 2023, Evergy voluntarily dismissed its case in Lafayette County Circuit Court. One week later, it refiled that case as Case Number 23LF-CV00939.

<sup>29</sup> Complainants allege that at least one landowner believed that MODOT’s planned widening of the road required Evergy to expand its easement and, therefore, granted Evergy an expanded easement. See Formal Complaint, Attachment 2, Commission Case Number EC-2024-0015, Docket Item 3.

<sup>30</sup> On May 27, 2020, Grain Belt Express Clean Line LLC notified the Commission that it had changed its name to Grain Belt Express LLC. Letter 1, Commission Case Number EN-2020-0385, Docket Item 1. On June 9, 2020, the Commission recognized the name change. Order Recognizing Name Change 2, Commission Case Number EN-2020-0385, Docket Item 5.

<sup>31</sup> Application to Amend Existing Certificate of Public Convenience and Necessity, Case Number EA-2023-0017, Docket Item 10.

<sup>32</sup> Report and Order 70-76, Commission Case Number EA-2023-0017, Docket Item 287.

<sup>33</sup> § 386.510 RSMo. (granting an applicant thirty days after the Commission denies an Application for Rehearing to file a notice of appeal with the appellate court).

**a. GBCL's Original Certificate of Convenience and Necessity**

On March 20, 2019, following a remand from the Supreme Court of the State of Missouri, the Commission issued an Order granting GBCL's application for a CCN to build the Grain Belt Express transmission line.<sup>34</sup> This CCN included an approximately 780-mile, overhead, multi-terminal +600 kilovolt high-voltage, direct current transmission line and associated facilities.<sup>35</sup> The project was to span across Kansas, Missouri, Illinois, and Indiana, including approximately 206 miles in Missouri.<sup>36</sup> Originally, the Grain Belt Express line would deliver approximately 500 megawatts of electricity to Missouri.<sup>37</sup> The original route of the Grain Belt Express line is shown below:



Original Grain Belt Express Proposed Route. Thomas F. Shiflett Direct Testimony, Schedule 4 “Construction Plan for the Grain Belt Express Clean Line” 70, Commission Case Number EA-2016-0358, Docket Item 10.

Notably for purposes of this Report, the Commission in its March 20, 2019 Report and Order concluded that “Grain Belt’s Project will serve the public use, and [GBCL] qualifies as a public utility.”<sup>38</sup> This finding allowed GBCL to utilize the power of eminent domain to acquire involuntary easements to construct the Grain Belt Express line.<sup>39</sup>

The Commission’s March 20, 2019 Report and Order also included a provision that required GBCL to file an updated application with the Commission “[i]f the design and engineering of the project is materially different from how the Project is presented in [GBCL’s] Application.”<sup>40</sup>

<sup>34</sup> See generally Report & Order on Remand, Commission Case Number EA-2016-0358, Docket Item 758.

<sup>35</sup> *Id.* 9.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* 38.

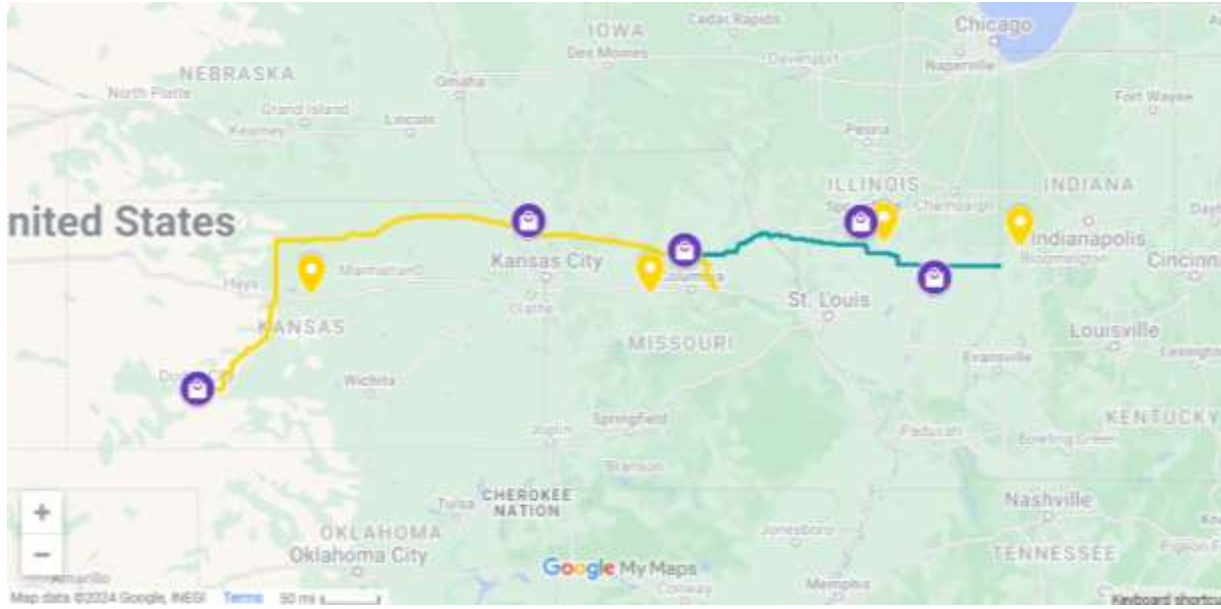
<sup>39</sup> See § 523.010 RSMo.

<sup>40</sup> Report & Order on Remand 52, Commission Case Number EA-2016-0358.



**b. GBE LLC's Application to Amend the Certificate of Convenience and Necessity**

On August 24, 2022, GBE LLC filed an Application to Amend Existing Certificate of Public Convenience and Necessity (the “Application to Amend”) before the Commission.<sup>41</sup> The Grain Belt Express line’s updated route is shown below:



Updated Grain Belt Express Proposed Route, available at: <https://grainbeltexpress.com/landowners/> (last accessed Jan. 1, 2024).

GBE LLC’s Application to Amend noted three amendments to the original CCN, including:

- (1) relocating the Missouri converter station from Ralls County to Monroe County and increasing the capacity of the Missouri converter station from 500 MW to 2500 MW;
- (2) relocating the AC connector line from Ralls County to Monroe, Audrain, and Callaway Counties, allowing for greater access of renewable power to Missouri and increasing benefits to Missouri; and
- (3) constructing the Project in two phases, allowing Missouri to realize the benefits of the Project earlier than it otherwise would.<sup>42</sup>

As to the second proposed amendment, which GBE LLC referred to as the “Tiger Connector,” GBE LLC noted that the “AC tie line will be approximately 40 miles, traversing south from the

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<sup>41</sup> Application to Amend Existing Certificate of Public Convenience and Necessity, Commission Case Number EA-2023-0017, Docket Item 10.

<sup>42</sup> *Id.* 1-2.



converter station in Monroe County, through Audrain County, and terminating in Callaway County at the existing McCredie Substation.”<sup>43</sup>

**c.     The Commission’s Report and Order Regarding GBE LLC’s Application to Amend**

On October 12, 2023, the Commission issued its Report and Order granting GBE LLC’s requested CCN,<sup>44</sup> but imposed conditions on its issuance. In addressing whether the CCN served the public interest, the Commission acknowledged the “negative impacts of the Project on the land and landowners.”<sup>45</sup> However, the Commission determined that these negative impacts “will be mitigated by” the conditions placed on the grant of the CCN, the applicable Protocols, provisions in the Easement Agreements, and protections included in Chapter 523 RSMo.<sup>46</sup>

In describing its conditions, the Commission noted that “a complaint may be brought to the Commission” if GBE LLC “does not comply with the conditions set out in this order.”<sup>47</sup> The Commission warned that it may seek to impose penalties against GBE LLC if it determined that GBE LLC “violated the provisions of the Commission’s order or other law within the Commission’s jurisdiction.”<sup>48</sup> However, the Commission recognized that “it does not have jurisdiction over eminent domain proceedings” and stated that landowners must seek remedies regarding violations of the eminent domain laws “from the courts.”<sup>49</sup>

With this new CCN, the Commission authorized GBE LLC to:

- (1) relocate the Missouri converter station of the Project from Ralls County to Monroe County and to increase the capacity of the Missouri converter station from 500 MW to 2,500 MW;
- (2) relocate the AC connector line (the “Tiger Connector”) from Ralls County to Monroe, Audrain, and Callaway Counties; and

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<sup>43</sup> *Id.* 8.

<sup>44</sup> Although GBE LLC characterized its Application to Amend as an amendment to the original CCN, the Commission “treat[ed] th[e] application as a request for a new certificate pursuant to 393.170.1, RSMo, for the Tiger Connector, relocated converter station, and the increased capacity of the transmission line.” Report & Order 5 n.2, Commission Case Number EA-2023-0017.

<sup>45</sup> Report & Order 61, Commission Case Number EA-2023-0017.

<sup>46</sup> *Id.* 61-63.

<sup>47</sup> *Id.* 68.

<sup>48</sup> *Id.* 68-69. The Commission specifically noted that in this circumstance, it “may decide to file an action in circuit court to seek penalties against Grain Belt. In such case, Grain Belt could be subject to penalties payable to the Public School Fund ranging from \$100 to \$2,000 per day of noncompliance, pursuant to Section 386.570, RSMo.” *Id.*

<sup>49</sup> Report & Order 69, Commission Case Number EA-2023-0017.

- (3) construct the Project in two phases.<sup>50</sup>

The Commission imposed a number of conditions on its issuance of the new CCN. These conditions include, but are not limited to the following. These conditions require GBE LLC to:

- (1) “return possession of the easement to the fee simple title holder . . . within 60 days and cause the dissolution of the easement to be recorded with the county recorder of deeds” if it “acquires any involuntary easement . . . by means of eminent domain proceedings . . . and does not obtain the [identified] financial commitments . . . within five years of the date that such easement rights are recorded . . .”;<sup>51</sup>
- (2) comply with the Missouri Landowner Protocol and to incorporate “the terms and obligations of the Missouri Landowner Protocol into any easement agreements with Missouri landowners.”<sup>52</sup>
- (3) “revise its Missouri Landowner Protocol to allow landowners along the Tiger Connector to have the option for compensation at the 110% plus structure payments the same as the landowners along the HVDC line.”<sup>53</sup>

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<sup>50</sup> *Id.* 70-71. In deciding that GBE LLC may construct the project in two phases, the Commission defined what GBE LLC must include in each phase. *Id.* It also modified the financing conditions set forth in its Report and Order on Remand in Commission Case Number EA-2016-0358 to allow GBE LLC to begin constructing Phase I if it received financing for that phase, as opposed to financing for the entire project. *Id.* 70-72.

<sup>51</sup> Specifically, the condition states:

If Grain Belt acquires any involuntary easement in Missouri by means of eminent domain proceedings (“easement”) and does not obtain the financial commitments referred to in Section I(1) and Section I(1)(a) of the Conditions Agreed to by Grain Belt and Staff (Attachment 1) within five years of the date that such easement rights are recorded with the appropriate county recorder of deeds, Grain Belt shall return possession of the easement to the fee simple title holder (“title holder”) within 60 days and cause the dissolution of the easement to be recorded with the county recorder of deeds. In the event of such a return of the easement to the title holder, no reimbursement of any payment made by Grain Belt to the title holder shall be due.

*Id.* 73.

<sup>52</sup> *Id.* 73-74. This condition states in full: “Grain Belt shall comply with the Missouri Landowner Protocol (Attachment 3), including, but not limited to, a Code of Conduct (Attachment 4) and the Missouri Agricultural Mitigation Impact Protocol (Attachment 5), and incorporate the terms and obligations of the Missouri Landowner Protocol into any easement agreements with Missouri landowners.” *Id.*

<sup>53</sup> *Id.* 74. In reaching its decision on this condition, the Commission recognized that § 523.039 RSMo. includes a “requirement for applications filed after August 28, 2022, for payment for agricultural or horticultural land at 150% of fair value.” *Id.* 53. It noted that this provision became effective on August 28, 2022, “just four days after [GBE LLC] . . . filed this application.” *Id.* 65. The Commission recognized that GBE LLC requested that the Landowner Protocols be changed “to authorize compensation to the Tiger Connector Landowners at 150% of fair market value” and to “eliminate the structure payments for the Tiger Connector landowners.” *Id.* However, the Commission also recognized that some landowners may benefit from choosing to receive 110% of fair market value plus per structure compensation, as opposed to 150% with no per structure compensation. *Id.* 49. Therefore, the Commission rejected GBE LLC’s proposal to allow landowners along the Tiger Connector to receive only 150% of fair market value, and,

- (4) include information regarding and contact information for the Ombudsman in its Missouri Landowner Protocol.<sup>54</sup>
- (5) file annual reports with the Commission until the line has been in service three full years that include information related to eminent domain proceedings, including notice to landowners, landowner complaints, and other information.<sup>55</sup>

### **C. Ombudsman Calls Received from Missouri Landowners**

In 2023, Missouri landowners contacted the Ombudsman regarding eminent domain activities in counties and municipalities across the State. These calls typically followed the receipt of a notice by or contact from an entity advising the landowner that it sought to acquire an interest in the owner's real property. The number of calls to the Ombudsman increased by approximately 43% from 2022, with approximately 40 calls received in 2022 and approximately 58 calls received in 2023. Given the statutory limitation on the guidance that the Ombudsman is able to provide,<sup>56</sup> all individuals who contacted the Ombudsman did not receive the assistance they requested.

The Ombudsman provided guidance to landowners on a wide range of topics. Some of the issues that arose include, but are not limited to:

- (1) the imposition of taxes on any condemnation award received;
- (2) when a property owner may be entitled to damages beyond the appraised price of the land itself;
- (3) general concerns regarding partial takings/temporary construction easements;
- (4) potential liability that may arise from the construction of electric power lines on property; and
- (5) when an entity may exercise the power of eminent domain to condemn an individual's property, including whether the project is necessary.

Many of the calls the Ombudsman received raised concerns with the accuracy of information that condemning authorities gave to landowners. For instance, many callers stated that condemning authorities told them that they would receive **no** compensation for their property if they did not reach an agreement with the condemnor before engaging in condemnation proceedings. Several callers said that condemning authorities could not identify the need behind their requested taking

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instead required GBE LLC to allow those landowners a choice of which compensation they preferred to receive. *Id.* 65, 74.

<sup>54</sup> *Id.* 75.

<sup>55</sup> *Id.* 75-76.

<sup>56</sup> See § 523.277 RSMo. (mandating that the Ombudsman “provid[e] guidance, which shall not constitute legal advice, to individuals seeking information regarding the condemnation process and procedures”).

or changed their position when questioned by multiple neighbors. Further, some callers acknowledged that potential condemnors could not identify exactly what property—including where an easement would be located on a parcel of property—the potential condemnor wished to take.

Of further concern, many callers referenced that condemning authorities attempted to pressure them into reaching an agreement outside of condemnation proceedings by referencing condemnation proceedings in a threatening manner. It is unclear whether all of these landowners received the 60-day notice letter advising them of their rights in condemnation prior to the condemning authority making these remarks.<sup>57</sup>

#### **D. Suggested Legislative Changes**

Many of the calls the Ombudsman received throughout 2023 raised concerns with the exercise of eminent domain authority. These concerns often revolved around false or incorrect information received from the condemning authority or the condemning authority referencing the condemnation process in a threatening manner. Many callers expressed concern that the eminent domain process is structured in a way that strongly favors the condemning authority and that landowners have no ability to contest the exercise of condemnation once an entity decides to take their property. To resolve some of these concerns, the Ombudsman suggests that the legislature consider changes that would protect landowners by requiring a condemning authority to

- (1) advise a landowner of his or her rights in condemnation prior to making an offer to acquire the landowner's property;<sup>58</sup>
- (2) provide all relevant information regarding the project and the requested taking to the landowner and allowing for a cause of action should the condemning authority provide false information; and
- (3) make an affirmative showing of public use and necessity that the landowner could dispute prior to the circuit court entering an order of condemnation.<sup>59</sup>

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<sup>57</sup> See § 523.250 RSMo. (describing what information must be included in the 60-day notice letter, including a list of landowner rights which must be referenced).

<sup>58</sup> Notably § 523.250 RSMo. requires a condemnor to provide this information “[a]t least sixty days before filing of a condemnation petition . . . .” § 523.250.1 RSMo. However, it is the Ombudsman’s understanding that some individuals do not receive this information until after they have been in negotiations regarding the appropriate price to acquire their property. The Ombudsman suggests that the legislature consider a change that would require a condemning authority to provide this information prior to their initial offer to the landowner, to ensure that all landowners understand their rights prior to engaging in negotiations to sell their property.

<sup>59</sup> At this time, it is the Ombudsman’s understanding that if a landowner would like to contest the necessity of the proposed taking, he or she “**must** plead and prove fraud, bad faith, or an arbitrary or unwarranted abuse of discretion of the condemnor in its claim of ‘necessity’....” *Missouri Pub. Serv. Comm’n v. H & W Inv. Co.*, 602 S.W.2d 41, 43 (Mo. Ct. App. 1980); see *Mapco, Inc. v. Williams*, 581 S.W.2d 402, 405 (Mo. Ct. App. 1979). The landowner may make these allegations in either a motion to dismiss or an answer asserting affirmative defenses in the Circuit Court. Either or both of these filings should likely be filed within thirty days of receiving service of the condemnation petition. See Mo. R. Civ. P. 55.27, 55.25.

Throughout 2023 the Ombudsman provided “guidance, which shall not constitute legal advice”<sup>60</sup> to individuals who contacted the Ombudsman. The Ombudsman also encouraged landowners to consult with an attorney if the landowner requested legal advice about their specific situation. However, it is worth noting that in many circumstances, the amount of likely damages is low enough that hiring an attorney could offset or exceed the amount of damages from the taking.

The lack of legal counsel for landowners remains a concern for condemnations and condemnation hearings, especially where the landowner wants to challenge the condemnation but cannot afford legal counsel. The entity asserting eminent domain is almost always represented by counsel that filed the petition for condemnation.

### **III. Conclusion**

It is clear that many entities continue to use eminent domain in Missouri. Few changes occurred to the laws governing eminent domain in 2023. However, in their calls to the Ombudsman many landowners raised concerns with the eminent domain process that they faced, including the quality of the information that they received from the condemning authority. The Ombudsman encourages the legislature to consider changes to the eminent domain laws to address these concerns.

For questions about this report, please contact Lindsay VanGerpen, Senior Counsel, at (573) 751-5565 or [lindsay.vangerpen@opc.mo.gov](mailto:lindsay.vangerpen@opc.mo.gov).

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This standard puts the burden on the landowner to not only know that this filing is required, but also to gather the information and evidence necessary to make these showings. Where many landowners cannot afford legal representation or the value of the condemnation does not justify the cost of representation, this burden is quite high.

<sup>60</sup> § 523.277 RSMo.